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EXHIBIT 3  
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HB 228

# Montana Shooting Sports Association

## 2009 Self Defense Bill

Explanation of sections  
Why each is needed, what each does

by

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**Qualifications to comment:** Gary Marbut is the author of the book Gun Laws of Montana, now the accepted standard on this subject in Montana, with nearly 10,000 copies in circulation. Gary is accepted in state and federal courts as an expert witness concerning use of force, firearm use for self-defense and related topics. Gary is a certified and veteran firearms instructor, having graduated nearly 2,000 students from classes teaching the safe and allowable use of firearms for self defense. Gary is a member of the International Association of Law Enforcement Firearms Instructors, having trained military, law enforcement, security and civilian personnel in firearm use. Gary is the long-time president of and chief lobbyist for the Montana Shooting Sports Association, the primary political action organization for gun owners and hunters in Montana. MSSA has achieved 50 pro-gun and pro-hunting measures passed by the Montana Legislature in the past 30 years. With input from many others, Gary is the primary compiler of this bill.

**Location of bill:** This explanation relates, section by section, to the current bill draft of MSSA's self defense bill as it is posted on the Legislature's Website at:  
<http://data.opi.mt.gov/bills/2009/lchtml/LC0672.htm>

### Section 1.

This section is a general restatement and elaboration of the principles associated with the Right to Bear Arms at Article II, section 12 of the Montana Constitution, whereby the people of Montana have reserved to themselves the right of "any person" to use firearms for self defense.

Subsection five, (5) is important and needed to clarify law in Montana resulting from the

1999 *Longstreth* opinion by the Montana Supreme Court.

[http://fnweb1.isd.doa.state.mt.us/idmws/docContent.dll?](http://fnweb1.isd.doa.state.mt.us/idmws/docContent.dll?Library=CISDOCSVR01^doaisd510&ID=003726618)

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If a person kills another while using a firearm for self defense, the person is considered to have committed a homicide - a crime. If prosecuted for that, the person is allowed to mount the affirmative defense of self-defense. However, under *Longstreth*, when mounting the affirmative defense of self-defense the burden of proof shifts to the defendant - that is, the person is presumed guilty until proven innocence. The jury instructions will be that the defendant must have proven justification for use of force in self-defense. This is in conflict with both American jurisprudence and with the exercise of a reserved constitutional right. (5) requires the prosecutors to prove that the defendant was NOT justified in using force for self defense to get a conviction.

Ten attorneys will offer ten different opinions about the actual effect of the *Longstreth* decision. That is exactly the problem! The law needs to be clarified on this issue in Montana. Prosecutors have argued in the past that *Longstreth* already requires what the bill states in (5). If that is so, why do prosecutors object to (5)?

Prosecutors have also argued that if they are required to prove absence of justification for use of force in self-defense, they will no longer be able to get convictions, although convictions are obtained in other states under this requirement. Of course, this argument is directly in conflict with prosecutor's claim that *Longstreth* already sets in law what (5) would put in statute. It's true that requiring prosecutors to prove guilt (lack of justification for use of force) will make their jobs more difficult than it currently is. It would be ever so much easier for prosecutors if they could just send people straight to prison without the awkward need for a trial to prove the accused guilty in court. But that's simply not our method of American jurisprudence, and not the system of justice the people choose. Section 1(5) will clarify the law and fix this problem in Montana.

## Section 2.

**No duty to summon help or flee.** In many other jurisdictions, case law or statutes have evolved requiring that a person may not use force in self defense, but must try to summon law enforcement ("dial 911 and die") or flee from attack rather than meet criminal acts with force. This shift in policy usually happens by degree in small steps, often beginning with arguments to a jury that a victim *could* have called police or escaped before using force to prevent victimization. The "stand your ground" philosophy is more consistent with Montana culture. Since this is not currently specified in Montana law, Section 2 would clarify this void by declaring in statute that a person is not required to summon help or escape before using force for self defense.

## Section 3.

**Defensive display of firearm.** Many other states have laws making it illegal to "brandish" a firearm, which implies waving or pointing a firearm in a wild or reckless manner. Montana has no such law. Yet people are being arrested or prosecuted in Montana for simply informing another person that they possess a firearm, usually for the felony crime of "intimidation." Section 3 draws a clear line that gun owners (and prosecutors) can understand between what conduct is not a crime at all (constitutionally-protected activity), and what conduct requires justification for use of lethal force under Title 45 of existing law. Where this line is drawn in Section 3 is derived from standard firearm safety doctrine, existing use of force law and common sense, in order to protect reserved constitutional rights, while allowing prosecution of people who commit unwarranted or dangerous acts with firearms.

For example, Section 3 requires that if a person puts another at risk of actual injury by pointing a firearm directly at another person or sweeping them with the muzzle of a firearm (standard firearm safety), this is NOT protected activity and requires justification for use of lethal force under Title 45 to be legal and safe from prosecution. However, if a person simply informs another that they possess a firearm, or shows another that they possess a firearm, this activity is protected as a reserved constitutional right and is no crime at all.

Because Montana law is currently silent on this subject and because people are currently being prosecuted for conduct within this legal void, Section 3 is very needed to clarify the law in Montana.

## Section 4.

**Investigation of alleged offense involving self-defense claim.** The mission of police is to enforce the laws. That's exactly why they are called "law enforcement." Understandably, when they investigate the scene where self-defense is utilized, they are focused on determination of what laws may have been violated. Law enforcement personnel have a very understandable bias towards discovering and preserving evidence that supports the contention that laws have been violated - that's simply their mission. In such a situation, it is very possible that investigators will overlook or fail to secure evidence that may tend to support the claim that a defender has used force legally in self-defense. If the defender is charged with a crime, often weeks or months will have elapsed before investigators for the defendant are able to examine the scene for evidence that may support the defender's claim of self-defense. By then, such evidence is usually be gone.

Section 4 requires that investigators look for and collect all evidence, including evidence that could exonerate a person claiming self-defense. Investigators say that this need is already included in their professional standards for investigation. If that is so, they shouldn't object to this requirement being placed in statute, another clarification needed in existing

law. Further, citizens shouldn't be required to rely on changeable occupational standards drawn by un-elected organizations of public employees in order for citizens to stay out of prison.

## Section 5.

**Award of attorney fees and costs.** Some prosecutors like to "throw the book" at people who defend themselves - to charge them with everything from jaywalking to treason. They pile on multiple charges knowing that many cannot be proven in court, but to so inflate the costs of the defendant's defense as to make legal defense totally unaffordable, forcing a defendant into a plea bargain and admission of guilt for a person who may not be guilty of doing anything wrong. It certainly makes life easier for any prosecutor if he can clear his desk of cases using plea bargains. No trial, work, jury or verdict are required. This leads some prosecutors to "charge heavy" to force the plea bargain and thus clear their desk of cases.

Section 5 levels the scales of justice to prevent an accused from being railroaded with heavy charging by allowing the accused to recover defense costs for any charges that are dismissed or for which the accused is exonerated. This should discourage prosecutors from filing charges they don't really have the facts to prove. This will also make it economically possible for the accused to mount a viable legal defense when a prosecutor tries to force a guilty plea with a plea bargain with heavy charging. Section 5 cures an existing problem with how Montana law is structured and applied.

## Section 6.

**Conditions for seizure of firearm -- return of seized firearm.** When law enforcement personnel arrive at an incident where a firearm has been used in self-defense, it is understood that the law enforcement officer (LEO) must take control of the scene to assure the safety of the LEO and of other persons at the scene. This will often, but not always, require the officer to take possession of the firearm used in self-defense to secure the scene. This is especially true if the officer has probable cause to believe that a particular firearm was used to commit a criminal act.

However, law enforcement practice too often goes well beyond these necessary and acceptable actions. LEOs will often seize a firearm, ostensibly for generalized "safety" reasons, even though there is no probable cause to believe the firearm was used to commit a crime. Too often, multiple firearms are seized regardless of any contention that many were used in conjunction with any criminal activity. Once these firearms are seized, it may become very difficult, very expensive, or even impossible for the owner to regain possession of his or her property.

Section 6 clarifies all of this by establishing fixed timelines beyond which law enforcement may not retain firearms taken unless for good reason. And, Section 6 requires that a person be given a receipt for a firearm seized so the person will have proof and a record of what was taken, and so the firearms cannot mysteriously disappear in the process, something known to occasionally happen.

The exact hours and days specified in the bill are much less important than that times certain are expressed in law, that receipts must be given, that firearms must eventually be returned to a rightful and lawful owner without a forbiddingly expensive process, and that the persons or agency in temporary possession be held accountable for that possession and for any loss of or damage to firearms in their possession. This will clarify an area of Montana law that is now either vague or silent.

## Section 7.

**Firearm not to be destroyed.** In some places in the U.S., firearms are routinely destroyed within 24 hours of acquisition by a law enforcement agency, if not needed as evidence in a prosecution, specifically to thwart firearm return to lawful owners. When queried about the practice by this writer (at an FBI National Academy Conference in Minneapolis), a patrol captain from Illinois asserted that this practice is because "Every gun destroyed is one less gun that will be used in a crime."

Section 7 prevents this egregious practice from gaining a foothold in Montana by requiring that law enforcement agencies may not be destroy firearms that are legal for people to possess. If firearms seized cannot be returned to the rightful owner, they must be sold to a licensed firearms dealer and the income from that sale must go into the public treasury. Selling any non-returnable firearms to a licensed dealer avoids any liability for the law enforcement agency for the safe working condition of the firearm. It also returns the firearms to the Montana marketplace for citizen ownership.

## Section 8.

**Landlords and tenants -- no firearm prohibition allowed.** Although important, property rights are not absolute. When a person sells property, they give up their property rights. Many property rights are surrendered with a lease or rental as well, such as the owner's right to exclusive use of the leased property. For example, if a motel owner rents a motel room to a paying guest, the owner voluntarily gives up the right to sleep in the bed in the motel room rented, in fair exchange for the income received.

Once a person leases or rents a place to live, even if just overnight, that place becomes the renter's domicile - his castle. The renter enjoys certain property rights associated with the place becoming his domicile. Rights associated with a domicile become especially

important when they are constitutional rights. It would not be acceptable, for example, for a rental property owner to require a renter by contract to surrender his right to trial by jury while renting the property, to require a renter by contract to promise to vote only for candidates of one party or persuasion (or not vote at all), to require a renter by contract to never write a letter to the editor, to require a renter by contract to never allow a person of another race to visit the property, etc.

There have been several examples in Montana where people renting or leasing property for their domicile have been told that they may not possess firearms on the rented property. This potentially denies the renter the most fundamental right, the right to live, because it denies the renter or leaseholder the ability to conduct his own self defense or the defense of his family. It deprives the occupant of the domicile the right to defend his castle.

Section 8 does allow a landlord to prohibit firearm discharge on the leased or rented property, except in cases of self-defense. This section fills another critical void in Montana law.

## Section 9.

**Employer prohibition of means of self-defense.** When an employer employs you, that employer has certain obligations to provide a safe workplace. That includes protecting an employee from predictable hazards. It is insufficient to post a sign at the main entrance to a workplace announcing, "No criminal predator is allowed to prey on company employees here - by company policy." That is an unrealistic approach, and an empty assurance of worker safety. It is similar to a theoretical company policy saying, "No structural fires are allowed on company property so no fire exits to the building are provided."

If a worker's job is in the wilds of Grizzly country, it would be nonsensical for an employer to adopt a work policy prohibiting employees from climbing trees or shouting for help if attacked by a Grizzly, a policy for which an employee in violation could be fired. It is equally nonsensical to allow the employer prohibit the same employee, as a part of the employment contract, from possessing a firearm to protect herself or himself from an attacking Grizzly, or a two-legged predator.

Section 9 holds that if an employer prohibits an employee from possessing the tools to defend herself or himself, the employer assumes an absolute responsibility for overtly defending the employee from a predator, four-legged or two-legged. The theoretical sign posted at the main entrance to the workplace mentioned above would not satisfy this requirement, nor would a pensioner in a uniform sitting at a reception desk at the entrance. The alternative is that the employee be allowed to provide for her or his own defense.

## Section 10.

Section 10 is just a code clarification required by the Code Commissioner. It has no effect.

## Section 11.

For the last 20 years Montana has tested a public policy of trusting citizens to behave well if allowed to carry concealed firearms for self-defense. That experiment has worked stunningly well. Since 1991 a concealed weapon permit has not been required for a person to legally carry a concealed firearm outside of the limits of a city or town (99.4% of Montana according to the Montana League of Cities and Towns). There are ZERO reported incidences of people abusing this privilege in the 99.4% of Montana it applies to in the past 20 years. The Legislature did the right thing in 1991 to trust its citizens to behave well.

It is now time to extend this proven privilege to trustworthy Montana citizens in the remaining 6/10ths of 1% of Montana, inside the limits of cities and towns.

Section 11 would leave existing process for applying for and issuing concealed weapon permits in place, so citizens could obtain them for out-of-state travel and for preapproved firearm purchases from licensed dealers under the federal Brady Law.

For others, Section 11 would change the law to make it not a crime to carry a concealed firearm in the remaining 6/10ths of 1% of Montana, without a permit, as long as the person is not using the firearm to commit a crime. Thus, the crime of carrying a concealed firearms would only apply to bad guys - people committing crimes, a proper focus for criminal law.

This change in Montana law has been opposed in the past by law enforcement administrators, but not by street-working officers. What Section 11 would accomplish is already the situation in nearly all of the jurisdiction covered by sheriffs departments in Montana, and they have found citizen firearm carry agreeable. So, the primary opposition has come from chiefs of police in the larger urban areas of Montana.

A retired FBI agent explained this opposition this way. Police administrators see everyone out after 11 PM as "up to no good" unless the person is delivering pizza or newspapers. They want their officers to have a tool to roust or intimidate those out late and not working. As long as a concealed weapon permit is required to carry a firearm, then working police officers can be instructed to stop and frisk any "up to no good" people for concealed weapons. This physical search is used to intimidate those perceived to be "up to no good." If a permit is no longer required inside city limits, police administrators would no longer have a tool to roust perceived undesirables. So, the real law enforcement application of the current law is to roust perceived undesirable people.

We say that if law enforcement needs a specialized tool to intimidate people perceived as "up to no good," let them come to the Legislature and ask the Legislature to craft a legal tool for that purpose. But don't lay this burden on law abiding gun owners - don't make it

difficult or illegal for the 99.9% of citizens who are law abiding to be able to provide for their personal security only to give police a tool to intimidate the elements they think are "up to no good."

When the change to a mandatory-issue concealed weapon permit process was first proposed for Montana in 1989, law enforcement administrators testified to the Legislature that this would result in shootouts on every street corner and blood in the streets. Despite this claim, the Legislature changed the law in 1991. The dire prediction by law enforcement of widespread bloodshed proved to be totally wrong and unwarranted. The modest change now proposed for Montana by Section 11 has long been the case in Vermont, and is currently the case in Alaska. This privilege in Vermont and Alaska has NOT resulted in any mayhem. Conversely, interpersonal crimes of violence are reduced everywhere citizens are trusted to provide for their own defense by carrying concealed firearms.

## Section 12.

**Arrest by private person.** Currently Montana law allows a citizen to hold for law enforcement a person believed to have committed a crime. This is called a "citizen's arrest." However and curiously, Montana law does not authorize ANY use of force to restrain a person placed under citizen's arrest. If the person arrested wishes to just walk away, there's no legal way to detain them. If the citizen uses any force, the citizen could be prosecuted for assault or illegal restraint, or sued civilly.

Section 12 authorizes a person making a citizen's arrest to use reasonable force to detain the person arrested until law enforcement can arrive. It authorizes lethal force, such as a firearm, only under laws already in place for use of lethal force in Title 45. This cures another void in Montana law.

## Section 13.

Section 13 repeals 45-8-317, MCA. Section 13 works in conjunction with Section 11, above. 45-8-317, MCA is an existing statute listing types of people who are exempt from the crime of carrying a concealed weapon, such as police officers, people with concealed weapon permits, and people outside the limits of a city or town, etc. Because non-criminal citizens would not be required to have permits to carry concealed firearms inside city limits (as is now the case outside city limits) if Section 11 is enacted, it will no longer be necessary to have a list of people in 45-8-317, MCA exempt from the law about illegal concealed carry.

End